(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: MAR 18 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The petitioner filed a motion to reconsider the decision, which the director dismissed. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as an elementary school teacher for , Maryland. At the time she filed the petition, the petitioner worked at College Park, Maryland. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States. In dismissing the petitioner's motion, the director added a finding that the petitioner had not shown that her work presents a benefit that is national in scope.

On appeal, the petitioner submits a brief from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree or its defined equivalent. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest

by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

When the director dismissed the petitioner's motion to reconsider, the director stated: "There is no appeal to this decision." The director cited no regulatory support for this assertion. The petitioner, through counsel, filed an appeal anyway, and the AAO will accept the appeal.

Because the petitioner appealed the dismissal of the motion, rather than the initial denial of the petition, the appeal must address that dismissal before the AAO will address the merits of the underlying petition. In this instance, the grounds for dismissal of the motion are closely linked to the grounds for the earlier denial; both concern the national scope of the benefit arising from the petitioner's work. Therefore, in this appellate decision, the AAO will consider the merits of the petition; such

consideration is effectively identical to consideration of the motion to reconsider and the director's dismissal thereof.

The petitioner filed the Form I-140 petition on September 28, 2011. In an accompanying statement, counsel stated:

> Briefly, the merit of [the petitioner's] request for National Interest Waiver is based on [her post-baccalaureate experience] equivalent [to an] advanced degree, her extensive teaching experience and her commitment to developing new ways of educating kids through [redacted] that she wrote under the commission of the Australian government. One of the most notable modules she authored under the program [redacted] was for 3rd grade and 4th grade students, who had extreme difficulties reaching learning centers in the Philippines due to geographical hindrances or economic limitations. By implementing the module she expertly created, these less-fortunate kids were able to receive quality education from a distance without leaving their homes.
>
> [The petitioner's] remarkable work with the [redacted] is still being used today in the Philippines and remains as her most remarkable legacy – one that she intends to continue in the United States, whether at [redacted] in Maryland where she currently works, or anywhere in the country where difficulties in the delivery of quality education are rampant.

(Counsel's emphasis.) The petitioner described the conditions that led to the creation of the distance learning program:

> Some learners in the Philippines especially in Mindanao are living in high mountains. There is no school and teachers in those high and dangerous mountains. The children living in those areas have to walk for hours just to go to school in the lowlands. Most of these children take long walks without slippers and meals crossing rivers, valleys, mountains and boulders of rocks, not to mention the hot scorching sun or the sudden flash floods that endanger their lives but they endure all these with just one desire, to have an education, to be educated. . . . With the help of the Australian government they[1] put up a big project called [redacted] . . . In this project they hired the best teachers and I am one of those teachers that were chosen to write modules for these learners. . . . Until now they are still using it.

Certificates from various sources confirm the petitioner's work as a [redacted]' for the Basic Education Assistance for Mindanao program. The documents do not indicate that the petitioner played any other role in the inception or implementation of the program, or establish how writing modules for the distance learning program significantly differs from a teacher's routine duty of creating lesson plans.

[1] The petitioner did not specify who "they" were.

It is significant to inquire how the petitioner's past work on behalf of students who dwell in remote, mountainous regions will affect her future ability to benefit, prospectively, the United States. Regarding the assertion that the petitioner "intends to continue" her "work with the . . . at " the petitioner did not submit evidence that comparable "difficulties in the delivery of quality education are rampant" in or elsewhere in the United States. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner submitted several letters from teachers and administrators who have worked with the petitioner, as well as parents (and one grandparent) of her students. The witnesses praised the petitioner's work in varying levels of detail, but almost none of them indicated that the petitioner's past work has had a significant impact beyond the schools where she has taught. An exception is kindergarten grade level chair at who stated that the petitioner "created the expansive scenery for a Chinese Crane dance the Head Start and Prekindergarten students performed. The Chinese Crane dance performance and [the petitioner's] art work received international attention." did not describe the nature of the claimed "international attention." The petitioner herself had stated that has a sister school in China," and Sunmi Ahn, another teacher at stated that the school holds "Community Day, which is a yearly event of partnership with schools in China." The record does not document the "international attention" attributed to the dance performance, or show that such attention went beyond the community in China that houses sister school.

The director issued a request for evidence on March 20, 2012, instructing the petitioner to submit evidence to meet the *NYSDOT* guidelines. In response, counsel cited a study showing that special education teachers "shift careers" and move to general education, and therefore "[t]he protection afforded for US workers enshrined in the labor certification process will not in any way be jeopardized by grant of waiver in favor of" the petitioner. The statutory standard is that the waiver will serve the national interest, and counsel's observation does not address that standard.

The petitioner's initial submission showed that she possesses certification in special education (among other areas), but it is significant that the initial statements from counsel and the petitioner did not mention special education at all. Letters from teachers and administrators likewise did not refer to the petitioner as a special education teacher. Counsel's statement in response to the request for evidence, therefore, represents a very significant shift in emphasis. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm'r 1998); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971), which require that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition.

Counsel contended that the labor certification process "would not meet the objective of the employer to hire highly qualified teachers pursuant to No Child Left Behind." Section

1114(b)(1)(C) of the No Child Left Behind Act, 20 U.S.C. § 6314(b)(1)(C), dictates that "[a] schoolwide program shall include . . . [i]nstruction by highly qualified teachers." The regulation at 34 C.F.R. § 200.56 defines the term "highly qualified teacher." Counsel did not discuss the regulation or Maryland's state-specific requirements, or cite any evidence to show that the labor certification process does not permit the hiring of "highly qualified teachers." If, by law, a teacher must be "highly qualified," then a teacher who does not meet the applicable requirements is not "minimally qualified." Rather, that teacher is underqualified or unqualified. Counsel has not shown that the labor certification process has forced [redacted] or any other Maryland jurisdiction to hire teachers who do not meet the requirements of "highly qualified teachers." Rather, because "highly qualified" is the statutory standard for such teachers, that term appears to be functionally equivalent to the term "minimally qualified" for purposes of labor certification.

Counsel claimed that it is impractical or impossible to compare the petitioner to other teachers:

> Even if for instance that the 'beneficiary's contribution have [*sic*] been significantly greater than the other workers in the field' needs to be demonstrated, it is our respectfully [*sic*] manifestation that no less than the United States Constitution prevents [the petitioner] from obtaining information of her colleagues regarding their credentials to determine what contribution they have accomplished for purposes of comparing whether her contributions are greater than those other workers. Hence, even if the burden of proof is on the petitioner, there is no obligation to do so since the supreme law of the land protects every citizen's right to privacy and thus accordingly restricts her from obtaining same.

Clearly this is not the case; counsel cites no judicial finding that overturned or limited *NYSDOT* based on privacy concerns (or for any other reason). Counsel's contention rests on the false assumption that the *NYSDOT* guidelines amount to little more than an item-by-item comparison of an alien's credentials with those of qualified United States workers. The key provision, however, is one to which counsel has paid little attention: the petitioner must establish a record of influence on the field as a whole. To do so does not require an invasive review of other teachers' credentials.

The director denied the petition on August 15, 2012, stating that the petitioner had not addressed the *NYSDOT* guidelines. In the subsequent motion to reopen, counsel abandoned the emphasis on special education first expressed in the response to the request for emphasis. Counsel stated that the petitioner's "request for waiver of the labor certification is premised on her advanced degree of Master of Arts in Educational Administration. She also has more than ten (10) years of experience. [The petitioner's] awards were also submitted." Degrees, experience, and recognition for achievements and contributions are all elements of a claim of exceptional ability. *See* 8 C.F.R. §§ 204.5(k)(3)(ii)(A), (B) and (F), respectively. Thus, counsel essentially claims that the petitioner merits a waiver as an alien of exceptional ability in her field. As noted previously, exceptional ability in the sciences, the arts or business is not sufficient to warrant the national interest waiver. The plain wording of section 203(b)(2)(A) of the Act indicates that aliens of exceptional ability are, by default, subject to the job offer requirement (including labor certification). Counsel repeats this assertion on appeal, necessarily with the same result.

Counsel stated that the students of would suffer "a clear disadvantage, injustice and prejudice" if the petitioner "is terminated from her duties as a 'Highly Qualified Elementary teacher.'" Counsel stated: "her assigned school has already tried and tested the abilities of [the petitioner] and apparently, her school would not even consider risking the best interest of the students for any other U.S. worker, either applying on their own or in response to the labor certification process." The record offers no support for this speculative rendition of the school district's hiring decision.

The director dismissed the petitioner's motion on October 24, 2012, stating:

> USCIS stands by its initial decision. In addition, USCIS inadvertently omitted its belief that your work is not national in scope. *Matter of New York State Dept. of Transportation*, 22 I&N Dec. 217, n.3, states, in pertinent part, that "while education is in the national interest, the impact of a single schoolteacher in one elementary school would not be in the national interest for purposes of waiving the job offer requirement of section 203(b)(2)(B) of the Act." This is because your occupation as an Elementary School teacher will produce only local benefits. Thus, USCIS concludes that the proposed benefit would not be national in scope.

The director also rejected the assertion that federal legislation such as the No Child Left Behind Act requires USCIS to grant the national interest waiver to school teachers.

On appeal from the director's second decision, counsel again cites the No Child Left Behind Act and other federal statutes and initiatives, stating that they highlight "the Urgent Need for Highly Qualified Teachers." In this way, counsel conflates the national importance of "education" as a concept, or "educators" as a class, with the impact of one teacher. The undeniable importance of education as a whole does not imply that Congress has indirectly exempted teachers such as the petitioner from the job offer requirement.

Counsel states:

> [T]he most tangible national benefit to be derived from a 'Highly Qualified Mathematics Teacher' is recreating a society of responsible and values-driven citizens including a highly productive and well-balanced work force that would translate the current recession adversely affecting the United States of America into a formidable economy again including national security.

Counsel fails to explain how the actions of one teacher would contribute significantly to nationwide social reform and economic recovery (except to speculate that one of her students may eventually become "a national figure such as a President, a legislator, a member of the judiciary, a scientist, among others"). General assertions about the overall importance of education, and the need for education reform, do not exempt every teacher from the job offer requirement. As members of the professions (as defined in section 101(a)(32) of the Act), teachers are subject to the job offer/labor certification requirement set forth in sections 203(b)(2)(A) and (3)(C) of the Act. Likewise, aliens of exceptional ability who "will substantially benefit prospectively . . . the United States" are also subject to the job offer provision of section 203(b)(2)(A) of the Act. Congress created no blanket waiver for teachers. It is clear from the statute, therefore, that an alien who works in a beneficial profession such

as teaching is not automatically or presumptively exempt from the job offer requirement, notwithstanding conjecture about what her students may achieve decades in the future.

Counsel asserts: "Exclusively and strictly enforcing the rudiments behind the New York State Department of Transportation Case to Highly Qualified Teachers is unjust, unreasonable and damaging to the 'Best Interest' of the American School Children." Precedent decisions are binding on all USCIS employees in the administration of the Act. *See* 8 C.F.R. § 103.3(c). Counsel cites no statute, regulation or case law that would require or permit USCIS to disregard *NYSDOT* as it applies to school teachers. Counsel attempts to distinguish the present matter from *NYSDOT* by observing that the beneficiary in *NYSDOT* was a bridge engineer who, unlike the petitioner, worked with inanimate objects rather than human beings who will, themselves, grow up to become United States workers protected by the labor certification process. This arbitrary effort at distinction is not persuasive. The statutory job offer requirement applies to all professionals, a class that includes not only teachers but physicians and attorneys, all of whom work with "people" rather than "things."

Throughout this proceeding, rather than attempt to meet the requirements set forth in *NYSDOT*, counsel has sought instead to demonstrate that *NYSDOT* does not, or should not, apply to school teachers such as the petitioner. All of these attempts fail to persuade, for reasons explained above.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, approval of the waiver cannot rest on the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.